

1914  
 Sept. 10.

IN THE MATTER OF THE PETITION OF RIGHT OF

JOSEPH PIERRE DIONNE,

SUPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

*Negligence—Railways—Open switch—Air brakes—Fellow servant—Contributory negligence—Prescription—Interruption.*

An injury to a brakeman on a train of the Intercolonial Railway, resulting from the negligence of the employees of the railway in leaving a switch open without warning, is actionable against the Crown under sec. 20 of the *Exchequer Court Act*. The suppliant having himself been guilty of contributory negligence in failing to have on the air brakes, as required by the rules, the doctrine of *faute commune* was applied and the damages assessed accordingly.

2. The doctrine of fellow servant is not in force in the Province of Quebec.

3. The prescription for the filing of a petition of right is interrupted by the deposit of the petition with the Secretary of State.

**P**ETITION OF RIGHT to recover damages for personal injuries to a brakeman of the Intercolonial Railway.

Tried before the Honourable Mr. Justice Audette, at Fraserville, Que., June 22, 23, 1914.

*E. Lapointe*, K.C., and *A. Stein*, K.C., for suppliant.

*E. H. Cimon* and *Léo Bérubé*, for respondent.

AUDETTE, J. (September 10, 1914) delivered judgment.

The suppliant brought his petition of right to recover the sum of \$10,000 damages alleged to be suffered from a broken foot, resulting in permanent disablement, as a result of a railway accident, arising out of the negligence of the employees of the Intercolonial Railway, a public work of Canada.

The action is brought under the provisions of sub-sec. (f) of sec. 20 of the *Exchequer Court Act*.

The accident in question occurred on May 20th, 1912, and the petition of right was filed in this court on December 3rd, 1913, more than a year after the accident. However, it appears from the evidence that the petition of right was left with the Secretary of State on May 12th, 1913, and for the reasons mentioned in the *Saindon* case,<sup>1</sup> it is found that such deposit with the Secretary of State, in compliance with the statute in that behalf, has interrupted prescription, which would otherwise have barred the present action.

The train in question is what is called the *shunter train*, used to gather and leave cars from and at the several stations within its territory, arrived at Montmagny, at 6.35 a.m. on May 20th, 1912, on a fine and bright day. The suppliant was one of two brakemen on the train. Diagram, Exhibit No. 2, prepared at the time of the accident, will be hereafter used to indicate the several places at which the train travelled while at Montmagny.

On arrival, the train was placed on the siding D, when the conductor with the brakemen went to the station to get, from the agent in charge, the instructions respecting the work to be done at that station and were given the *switch card*, with explanation, showing what they had to do. They had a box-car

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<sup>1</sup> 15 Can. Ex. 305.

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to leave at that station, at what is called Price's Siding, marked J. They therefore left the point D, travelled to J, and returned to the main line, where they were told by the conductor, who remained off the train, to then go to the place called the Basin, and take from there 4 platform cars. The Basin, or the object of their present destination, is marked as point A on the diagram and is at a good distance outside of the railway yard at Montmagny. These 4 cars were to be taken to point Z, west of the station. While the engineer, with only one brakeman, Dionne, the suppliant, had left for the Basin, the conductor, who had failed to go with them, as his duty called him to do, and as so acknowledged by him, told Jean Albert, the other brakeman, that as they had cars to get from F, which was accessible through D, to open switch D, meaning, as he said, D and E. Albert did as he was told, opened switches D and E, and went on siding J to attend to some other work, leaving switches D and E opened and unprotected, thus transgressing and contravening the rules and regulations imposing upon him the duty to stand by the switches until closed.

The engineer and brakeman Dionne, on their return from the Basin with the 4 cars, were not aware that switch D was open and they were under the impression they were going to point Z, where the 4 cars were to be placed. The conductor said he expected them to go only to the station, but as the station is west of point D, it is of no consequence. The engineer says he was coming back from the Basin at about 6 or 7 miles an hour, at his post, looking in front, but that the whistling post, which has been removed since the accident, obstructed his line of vision with respect to switch D. He further says

he should never have been left alone with Dionne to go to the Basin—that he was very much surprised on his arrival there to find both the conductor and the second brakeman absent, and that on approaching D he was looking for them, but they were both away. On arriving at point D, according to him (and according to Dionne, at the last bridge),—Dionne signalled to stop the train, and he then applied the emergency brakes, but he could not stop his train until it had run into the switches D and E, coming in collision with the cars on the loading siding F, where two of the platform cars of his train were smashed and the third one was somewhat damaged. Dionne, the suppliant, realizing the situation, jumped from the western platform-car at about the point marked Y on the plan, and broke his foot. The engine was travelling with the tender behind and the 4 cars in front, and Dionne, seeing himself placed on the western car, the one that would necessarily collide, said: “A la vie, à la mort,” better for me to jump to save my life, and he did so.

The total laxity with which the work assigned to these train hands has been carried on is most conspicuous and is only equalled by their total disregard for the rules and regulations of the railway directing them in the discharge of the duties incumbent upon them under such circumstances. These rules have been contravened in many respects. The train should not have gone to the Basin without the conductor and the two brakemen. The conductor admits, in a manly way, that he failed in his duty in not going with it. Brakeman Albert was suspended by the railway for 15 days in punishment of his breach of duty. The air brakes were not, but should have been, connected between the 4 cars and

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the engine, and last, the most flagrant violation of the rules, the switches should not have been opened and left opened without a man standing by to notify and warn the incoming train. The employees of the Crown, acting within the scope of the duties and employment, have severally and jointly been guilty of negligence which caused the accident in question.

The proximate cause, the determining factor which brought on the accident, was obviously the opening of these switches and leaving them opened without warning and the failing on behalf of the brakeman who opened them to stand by them and warn the incoming train. Under such circumstances the suppliant must succeed, as the case is brought within the four corners of sec. 20 of the *Exchequer Court Act*.

The next question to consider is whether the suppliant was guilty of contributory negligence. That question must be answered in the affirmative. There was no excuse for him not to put on the air-brake between the 4 cars and the engine. It was not done to save time, and he further says there are no rules obliging him to do so. True, there are no such rules, but there are no rules relieving him from doing so, and the air-brakes are not mere ornamental appliances, they are there to be used, and under Rule 17, in cases of doubt as to the proper course to pursue, he must take the safe side and not run any unnecessary risk. Then when he went to the Basin he travelled out of the railway yard for a very long distance. He was bound to have his air-brakes outside of a railway yard at least. Dionne says the air-brakes are put on in a yard only where there is a grade. Had the air-brakes been on, the speed could have been reduced much more promptly, and the

lesser the speed the lesser the danger. The inference is that had the air-brakes been on he would have been given an opportunity to jump with less danger and probably with less serious results. It is also questionable whether Dionne should not, or was not, in a position to give the signal to stop before it was actually given. The long series of breaches of duty seem to show that train hands get familiarized with danger and neglect to provide against it.

The legal doctrine of *faute commune* must therefore be applied and the damages assessed in view thereof. It is perhaps well to mention also that the doctrine of *fellow servant* does not obtain in the Province of Quebec.

The suppliant was paid during a certain number of weeks a sick allowance, at the expiration of which he was transferred to the Permanent Fund, and is now getting from the latter a pension of \$20 a month. The questions as to whether or not the sick allowance paid upon the form of receipts as appear on Exhibits E to J,—the pension paid him from the Permanent Fund and Rule 113 of the association are bars to his action, have been discussed in the *Saindon* case, *supra* and for the reasons therein mentioned these three questions must be answered in the negative.

The suppliant was about 36 years old at the time of the accident when he was a brakeman on the railway, earning various wages during almost eight years he had been so employed. He has been paid this sick allowance during almost 26 weeks, his hospital and medical care there paid by the railway and he is now receiving \$20 a month from the Insurance Fund, payable in cases of total disablement.

As a result of this accident he remains with an

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ankylosed instep, with the shortening by one inch of his leg at the heel and the lengthening by one inch at the end of the foot. When walking he is obliged to completely raise the injured limb and to move it out of the axis of his body, to avoid dragging the end of the foot. He is permanently injured, but he is not totally disabled. His capacity for work has decreased. Perhaps much more in ratio respecting the work of a brakeman than in respect to some other work which he could perfectly well discharge. He says he could work as baggageman on board a train and he says he has been working as a salesman in a country general store. See *Misner v. Toronto & York Radial Ry. Co.*<sup>1</sup>

Under all the circumstances, judgment is directed to be entered in favour of the suppliant for \$400 and costs.

*Judgment for suppliant.*

Solicitors for suppliant: *Lapointe, Stein & Levesque.*

Solicitor for respondent: *Léo Bérubé.*